No. 85-1686

(2)

Supreme Court, U.S.
FILED
MAY 17 1986
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1985

OTTAVIO BUSSANICH and ANTONIA BUSSANICH,

Petitioners,

vs.

UNITED STATES LINES, INC.,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of the State of New York

BRIEF IN OPPOSITION

DANIEL J. DOUGHERTY
KIRLIN, CAMPBELL & KEATING
Attorneys for Respondent
14 Wall Street
New York, New York 10005
(212) 732-5520

3148
Lutz Appellate Printers, Inc. • NJ (201) 257-6850 • NY (212) 840-9494 • PA (215) 563-5587 MA (617) 542-1114 • DC (202) 783-7288 • USA (800) 5 APPEAL

34PP

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Does this case warrant the sparing exercise of this Court's extraordinary certiorari jurisdiction where the result below is fully supported by the caselaw and evidence presented at trial?

2. Was the text as well as the substance of the Joint Maritime Safety Code in evidence for the jury's deliberations, inasmuch as the jury was never told that the code was stricken from evidence? Does this render the error, if any, harmless?

STATEMENT PURSUANT TO SUPREME COURT RULE 28.1

United States Lines, Inc. is a wholly-owned subsidiary of McLean Securities, Inc. The latter is traded publicly on the New York Stock Exchange and approximately 90% of its shares is owned by Malcolm P. McLean.

TABLE OF CONTENTS

Page

Counterstatement of Questions Presented i

Statement Pursuant to Supreme Court Rule 28.1 ii

Table of Contents iii

Table of Citations iv

Statement of the Case 1

Reasons for Denying the Writ:

I. The record below fully supports the result reached by the New York Court of Appeals. 3

A. The clear factual basis for the jury's verdict denies ripeness to the legal questions presented by the petitioners. 3

B. Petitioners were not prejudiced by the trial court's ruling on the Joint Maritime Safety Code 7

C. The Code does not impose a duty that is any different from the caselaw as charged. It is reconcilable with all cited cases. 12

D. Petitioners' codal argument is overbroad. ... 19

II. The charge was proper in all respects. 20

Contents

Page

III. The decision below does not "emasculate" the Code. 23

Conclusion 24

TABLE OF CITATIONS

Cases Cited:

Ayers v. Watson, 137 U.S. 584 (1890) 12

Carotenuto v. Surface Transportation, 271 A.D. 990 (1st Dept. 1947) 22

Dayton Board of Education v. Brinkman, 433 U.S. 406 (1977) 3

Franks v. U.S. Lines, 324 F. 2d 126 (2nd Cir. 1963) 21

Irizzary v. Compania Maritima Navegacion Neutmar, S.A., 1981 AMC 2424 (2nd Cir. 1980), *cert. denied,* 451 U.S. 969 (1981) 15, 16, 17

Kalish v. Krieger, 42 A.D. 2d 955 (1973), *aff'd,* 35 N.Y. 2d 864 21

Lemon v. Bank Lines, 656 F. 2d 110 (5th Cir. 1984) 20

Lukasiewicz v. City of Buffalo, 55 A.D. 2d 848 (1976) 12

Schieb v. Williams, 628 F. 2d 509 (5th Cir. 1980) 21

Contents

Page

Scindia Steam Navigation Corp. v. DeLos Santos, 451 U.S. 156 (1981) 2, 13, 15, 16, 17, 20

Statute Cited:

33 U.S.C. Section 905(b) 23, 24

Other Authorities Cited:

29 C.F.R. 1918-94(c) 15

H.R. Rep. No. 92-1441, 92d Cong., 2d Session, reprinted in (1972) U.S. Code Cong. & Ad. News 4705 16

Joint Maritime Safety Code, Part C1 ..... *passim*

APPENDIX

Appendix A—Portions of Trial Court's Charge Relevant to Negligence 1a

No. 85-1686

In The

Supreme Court of the United States

October Term, 1985

OTTAVIO BUSSANICH and ANTONIA BUSSANICH,

Petitioners,

vs.

UNITED STATES LINES, INC.,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of the State of New York

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Petitioner's characterization of the proceedings below is woefully inadequate, and carefully engineered to deceive this Court into assuming jurisdiction over an otherwise insignificant negligence case. Respondent herein adopts the factual findings of the opinion below (Petitioners' Appendix pp. 3a-5a), with the following clarifications:

This is the fifth judicial review demanded by the petitioner of the propriety of the jury's verdict, which concluded after more than 5 weeks of trial. Petitioners understandably limit their petition for certiorari to the issue of whether the Joint Maritime Safety Code of the Port of New York (herein the Code) when taken as a whole might be relevant to a shipowner's duties. Such an issue may indeed give rise to some academic legal argument concerning *dicta* in *Scindia Steam Navigation Corp. v. DeLos Santos*, 451 U.S. 156 (1981). It is not, however, the *real* issue in this case.

Throughout the appellate proceedings, petitioners have consistently ignored the real basis for their defeat at trial: *credibility*. Furthermore, in seeking review below by the New York Court of Appeals, petitioners made what should be the fatal blow to their credibility. Petitioners tendered to that court an intentionally altered trial transcript in an outrageous attempt to convince that court that the deliberating jury was interested in reviewing the Code.[1] We now enter the twelfth year of litigating an injury case wherein the petitioner Ottavio Bussanich was disabled for 33 days. We respectfully request that this Court put an end to petitioners' litigational harassment of the respondent by closing this "era" with a denial of the writ.

---

1. Respondent brought this to the lower court's attention in its brief on the merits, Point I. Petitioners moved to strike Point I of Respondent's Brief and Respondent's Appendix (which contained a true copy of the transcript) at oral argument. Petitioners' motion was denied. (*See* Petition, Appendix p. 12a.) Respondent intends to notify the appropriate disciplinary authority at the conclusion of this matter.

REASONS FOR DENYING THE WRIT

I.

THE RECORD BELOW FULLY SUPPORTS THE RESULT REACHED BY THE NEW YORK COURT OF APPEALS.

Although not specifically discussed in the opinion below, the following arguments were briefed by the respondent and are offered here in support of the judgment. [*See Dayton Board of Education v. Brinkman,* 433 U.S. 406, 419 (1977).]

A. The clear factual basis for the jury's verdict denies ripeness to the legal questions presented by the petitioners.

Petitioners "tease" this court with a legal issue presented *in vacuuo*. Petitioners would have this Court believe, that but for the exclusion of the Code from evidence, the petitioners would have prevailed at trial.[2] But an examination of the evidence presented to the jury will disclose that the legal question presented in the petition was of no consequence in the trial result. The real reason respondent prevailed at trial was the incredible testimony petitioners presented to the jury in support of their version of how Ottavio Bussanich was injured.

Perhaps the only "fact" presented at trial upon which both sides agreed was that Mr. Bussanich was hit by a piece of falling wood and that he was wearing a hard hat. Petitioners' trial attorney, Mr. Kenneth Heller, argued that the wood had been part of the vessel's ammunition sheathing. He claimed that the

---

2. As discussed at page 13, *infra,* the jury was never told that the Code had been stricken, and the petitioners were allowed to make unilateral use of the Code.

respondent was negligent because it allowed a piece of ammunition sheathing to hang like a sword of Damocles over the head of longshoremen who worked under it. To support that claim, Mr. Heller relied on his interpretation of the vessel's log book, and the testimony of Mr. Bozo Mircovich, a workmate of Mr. Bussanich.

Respondent argued that the wood fell from a cargo bulkhead fence which was being dismantled or knocked down by Bussanich's employer, Universal Maritime Service Corp. A cargo bulkhead fence is a temporary wooden structure used to separate cargo. Once the cargo is removed, as it was at Bayonne, the stevedore knocks the fence down because it has already served its purpose (1363, 1367-1368).[3]

While Universal (the stevedore) was removing the bulkhead cargo fence, a piece of the fence fell off and hit Bussanich. To support its defense, respondent relied upon the vessel's log book, the stevedore's accident reports, and the testimony of Joseph Mickey, Captain Flink and Captain Wheeler. One of the three accident reports (Exh. X) *contains a statement from Mr. Bussanich corroborating respondent's fence theory.* We quote from Exhibit X:

> "Claimant alleges: We were removing dunnage from lower hold. Thier (sic) was a fence holding cargo. I bent down to pick up piece of dunnage when 2 X 10 about 10 feet high fell off fence hitting me on top of head knocking my hard had off".

Quite obviously, if the jury believed this evidence it could quite easily reject Mr. Heller's theory of the case.

---

3. Numbers in parentheses with nothing more refer to pages in the appendix filed by the petitioner with the New York Court of Appeals.

Mr. Bussanich could not corroborate his attorney's sheathing theory. Indeed, his version, which was recorded on October 24, 1974 (*see* Exh. X), one day after the accident, totally undermined Attorney Heller's view of the case. At trial, some six years later, Mr. Bussanich testified that "something hit me", but he did not know *what* hit him (783). Mr. Heller had to look elsewhere to support his theory. He tried (and petitioners are still trying) to use respondent's log book (Exh. 10). But *if quoted accurately*, the log book does not corroborate the sheathing theory either. The log book merely confirms that the wood fell from a "bulkhead", and there was evidence that the terms bulkhead and fence can be used interchangeably (1483).

That being so, and because the stevedore's accident reports (including Mr. Bussanich's admission) specifically identified the wood as coming from a cargo fence (Exhs. W, X and Z), Attorney Heller's sheathing theory was in trouble. To get the case before the jury, Mr. Heller relied exclusively upon the testimony of Mr. Bozo Mircovich. It was the *sole source of support* for the sheathing theory. But the reliance was misplaced. Bozo's testimony defied common sense, the laws of gravity, and was specifically rejected by petitioners' own experts. He testified that a ten to fifteen foot length of 2 x 10 lumber which had been part of the ammunition sheathing fell from a wall and struck Mr. Bussanich (233-235). Prior to falling, the plank had been secured to the wall by a *single* eight-penny, common nail (238; *see also,* Pltfs' Exh. 6, a sample of the supposed nail). There were, said Bozo, no other nails and no other nail holes in the plank (240).

To place the inherent incredibility of that testimony in its proper focus, a description of the sheathing is necessary. Wooden ammunition sheathing is used to create a buffer between the ammunition and the metal skin of a ship. Its function is to prevent a spark from igniting the explosives. Petitioners' Captain Ash so testified (46-47). The consequences of an improper installation

could be drastic. The ship could explode. Lives could be lost. Millions of dollars could be wasted. All for the want of about 8 or 10 nails. Nonetheless, to believe Bozo, one would have to believe that the professional carpenters who installed the sheathing at Sunny Point, North Carolina were content to affix the plank with but a single nail.

Petitioners' own nail and carpentry experts both testified that Bozo's description of the accident was not possible and/or laughable.

However, Bozo's "one nail" testimony did "fit" respondent's cargo bulkhead fence theory. That's because there are no specifications for erecting a cargo fence (1397-1399). Such a fence is a rough temporary structure which is built to separate cargo, and which must be and was torn down by the longshoremen after the cargo has been discharged (1363, 1367-1368).

Another example of the incredible testimony offered by the petitioner is Bozo's testimony in his description of how Mr. Bussanich exited the hatch. To support his allegations of accident-related brain damage, and to get around his client's senility (1753) Attorney Heller needed some evidence of unconsciousness. He had to "hurdle" the log book and the Bayonne Hospital records (Exh. D), both of which contraindicated his allegations of unconsciousness.[4]

Bozo Mircovich testified that Mr. Bussanich had to be removed from the hatch. "He was in a daze, he couldn't stand up" (231). How then did Mr. Bussanich get out of the hatch?

---

4. The log book states that petitioner "walked ashore". The hospital records state "on 10/23/74 struck by 2 x 10 ft. piece of wood. Not unconscious, but dazed."

Was the stevedore's procedure for removing injured longshoremen followed? (*See* pages 1386-1388.) Was a Stokes Basket used? No! Two fellow longshoremen grabbed Mr. Bussanich's collar and pushed and pulled him up a very long, absolutely *vertical* ladder[5] (231-233).

It is upon this incredible background of testimony that petitioners seek this court's careful and time consuming review of a tangential legal question, which, as will be developed below, was properly decided at each level of review.

B. Petitioners were not prejudiced by the trial court's ruling on the Joint Maritime Safety Code.

The alleged "error" committed by the trial court below was not only harmless (assuming *arguendo* that it was error) but favorable to the petitioner.

At trial, Part C(1) of the Joint Maritime Safety Code[6] had been admitted into evidence during Mr. Heller's direct examination of the petitioner's expert Captain Ash. Before offering it, Captain Ash had testified that the Code is a codification of the custom and practice in the maritime industry (96-97). Respondent did not object (98), and the section was read to the jury (99-100). This section reads:

> "The owner, master and officers of the vessel shall supply and maintain in a safe condition for use all ship's gear, equipment, tools and work spaces which are to be used in stevedoring operations."

---

5. See Respondent's Exhibit FF, a representative photograph of the ladder in question (1443-1444).

6. Respondent's Exhibit 3.

Mr. Heller then made use of this Code section by asking Captain Ash to opine whether respondent had complied with same by providing petitioner with a safe place to work. Of course, Captain Ash replied that respondent had not done so (134-135). Mr. Heller continued to make use of the Code section during his deposition of Captain Kjeldsen (321-322), and during his cross examination of Captain Flink (1500).

During its case, respondent sought to "offset" petitioner's offer of the above cited Code section by having the court take judicial notice of (1631-1633) and charge[7] other sections of the same Code. These sections were favorable to respondent's position because they place the control of longshore operations exclusively in the domain of the stevedore, and they impress the stevedore with a duty to report accidents. In essence the following sections overwhelmed petitioners' Part C(1).

Those sections read:

> "B(2). The pertinent facts of accident occurrence shall be recorded on a suitable form for purposes of analysis and prevention.
>
> C(24). Ship's crewmembers shall not be permitted in the immediate vicinity of longshore operations except in the course of their duties, but in no event while under the influence of intoxicating liquor.
>
> F(2). At the start of operations, supervisors shall conduct a visual examination of all gear and operating conditions. They shall see that operations are carried on in a safe manner. Where there is

---

7. See Respondent's Request to Charge #48.

an immediate danger to the health or safety of men, they shall stop the work, if necessary, to avoid accidents.

F(3). Supervisors shall:

(b) Report any defect in the gear or machinery, or unsafe condition and promptly obtain corrections, before proceeding with work;

(d) Recognize, avoid and discourage, careless or reckless work practices or actions which are likely to result in injury to themselves or fellow workers;

(f) Make every effort to determine cargo hazards in advance, and to have correct personal protection at hand for known hazards.

G. Hatch Bosses shall:

(b) Order work stopped temporarily in his hatch to prevent personal injury where conditions in his judgment so warrant;

(c) Immediately notify the head foreman, or assistant head foreman, of any unsafe conditions or practices;

(f) Maintain good housekeeping, for example proper placement of hatch boards, beams, topping lifts, dunnage, hatch tarpaulins, guys, etc.

> J(1) Employees shall be thoroughly familiar with this Code paying particular attention to all safety devices and equipment required and provided for their own protection.
>
> J(2) Employees reporting for work shall wear safety shoes, work gloves and an approved type hard hat. In addition they shall wear any protective equipment which may be provided for a specific job or condition.
>
> J(4) All personnel shall refrain from careless or reckless actions that could result in an accident or injury to themselves or fellow workers. This includes all forms of horseplay."

The court agreed to take judicial notice of the above Code sections (1632), and respondent later requested a charge based on these sections. However, during the pre-charge conference, the court not only denied respondent's Request #48, but then ruled that the Code would be stricken from evidence.

During that conference, both sides contended that the Code codified the custom and practice (1925-1926). Respondent also argued that it would be prejudiced by a refusal to grant Request #48 because petitioners had already been allowed to use, *and had already read to the jury,* that portion of the Code which was favorable to their case (1927-1932).[8] However, the Court's ruling stood, and respondent's Request #48 was denied.

At that point, petitioners "had their cake and ate it, too". Mr. Heller reacted by "backing off" his earlier position in these words:

---

8. Respondent was never allowed to have the jury hear the above-quoted Code sections that it had offered.

> "I agree its a codification on custom and practice, and whatever Your Honor chooses to do, I'll pass on. I'll defer to Your Honor". (1928)

However, his deference was short-lived. The court's decision did not stop at denying respondent's requested charge. It also included a ruling that the entire Code was going to be stricken, and that the jury would be instructed to disregard it. At that point, Mr. Heller voiced an exception (1931-1932).

The striking of C(1) along with the *proposed* jury instruction to disregard C(1) would have denied petitioners the unfair advantage of an ex parte use of the Code. *But a review of the charge reveals that Mr. Heller's advantage was never lost because the jury was never instructed to disregard the Code.* The claimed error was obviously harmless to petitioner; it was an error in his favor.

The harmlessness of the so-called "error" continues to run even more deeply. Captain Ash testified for petitioner that the Code was a codification of the custom and practice in the maritime industry (96-97).

Against this backdrop *and without informing the jury of its ruling that the Code had been stricken,* the jury was instructed that:

> "Evidence of the general custom and usage by others engaged in the same trade or business of the Defendant was received in evidence as bearing upon the reasonableness of the Defendant's conduct under the circumstances . . .
>
> A General custom or practice in the particular trade or business, if proved to your satisfaction, may establish a standard of reasonable conduct

> in such trade or business. It is for you to determine whether or not the evidence in this case does establish a general custom or usage in the trade or business.
>
> *If you find it does, you may consider it in connection with your appraisal of the care exercised by the Defendant in this case,* but it is not [the] conclusive or controlling test of due care." (2159-2160) (Emphasis supplied.)

The jury was also instructed on the respondent's duty to provide petitioner with a safe place to work, and a reasonably safe ship.

Hence, the above-cited instructions gave the jury the invitation by the court to find the respondent negligent if the jury believed that U.S. Lines had not lived up to the industry's standards. Subsection C(1) of the Code was substantially the same as petitioner's 7th and 8th Requests to Charge which were granted (1798) and charged. It is well to recall at this point that a judge is not obligated to adopt the exact language of counsel when preparing the charge. *See Ayers v. Watson,* 137 U.S. 584, 601 (1890); *Lukasiewicz v. City of Buffalo,* 55 A.D. 2d 848 (1976).

C. The Code does not impose a duty that is any different from the caselaw as charged. It is reconcilable with all cited cases.

Part C, Section 1 of the Code reads as follows:

> "The owner, master and officers of the vessel shall supply and maintain in safe condition for use all ship's gear, equipment, tools and work spaces which are *to be* used in stevedoring operations." (2228) (Emphasis added.)

The words "to be" obviously contemplate that which will take place at a future time, viz., the commencement of stevedoring operations. Petitioners' own expert, Captain Ash, conceded as much, in the following testimony:

> "Q. Now for example a ship like the Pioneer Contender, *prior to its arrival* in the Port of New York For the purpose of either loading or discharging cargo, are there certain customs and practices that the ship's officers follow with regard to inspection of the ship's cargo holds?
>
> A. Yes.
>
> Q. And what are those customs and practices?
>
> A. They have to see to it that the vessel is in all respects ready to load cargo *on arrival*; that is, as to cleanliness, sanitary conditions, seaworthy condition, and its fixtures properly in place . . ." (Emphasis added.) (61).

Before turning over the work area, the Code requires the shipowner to exercise reasonable care to ascertain that its gear, equipment, tools and work spaces are reasonably safe for the stevedore's use. The Code *does not say* that the shipowner shall supply and maintain in safe condition for use all ship's gear, equipment, tools and work spaces while they continue *in use during stevedoring operations.*

The law is clear that the shipowner does not have "a continuing duty to take reasonable steps to discover and correct dangerous conditions that develop during the loading or unloading process." [Quote from *Scindia Steam Navigation Co. v. De Los Santos, supra*, 451 U.S. 156, 169 (1981)]. Consequently, absent

notice that a danger has arisen *after* the commencement of the stevedoring operations, neither the Code nor the caselaw support petitioners' contention that the shipowner must continue to "check up" to make sure that the work area remains safe.

At trial there was no evidence (indeed there was and is no claim) that the shipowner was on notice that its work area had become unsafe after the commencement of the stevedoring operations. Petitioners' entire case was aimed at proving that respondent somehow breached its pre-discharge duty of providing Bussanich with a reasonably safe place to work.

The only issue petitioners tried to send to the jury was whether the respondent fulfilled its duty of starting off Bussanich and his co-workers with a reasonably safe place to work. Respondent never denied that it had such a duty (2490-2194). The duty was charged to the jury at length (2151-2152, 2153, 2156-2159).

A charge on the Code would have been superfluous. Part C, Section 1 of the Code expresses the exact same concept which was expressed in the charge. The jury was invited to find for the petitioner if it found that:

> "the Defendant failed to properly inspect the ammunition bulkhead or sheathing prior to plaintiff's accident;" (2158).

The jury was also instructed that:

> "[t]he owner has a duty to see that such people as Plaintiff, while on board the ship, are not exposed to unnecessary risk, and to provide them with safety, and he is liable for negligence for his failure to take reasonable precautions for the safety of workers." (2157-2158).

Petitioners rely on *Irizzary v. Compania Maritima Navegacion Neutmar, S.A.*, 1981 AMC 2424 (2nd Cir. 1980), *cert. denied,* 451 U.S. 969 (1981), in support of their claim that the Code imposes a continuing duty to assure the safety of work spaces for longshoremen. They also rely on *Scindia, supra*. Their reliance is misplaced.

In *Irizzary* (a case which petitioners cite despite the Second Circuit's instructions to the contrary (*see* the footnote at p. 2425 of the opinion), a longshoremen was injured while walking across the icy top of a container. There was evidence that the ice and slush had accumulated *before* the ship reached port and *before* the stevedore had begun to work. *There was also evidence that the shipowner had actual knowledge of the ice and slush*, and of the fact that the plaintiff's job required him to walk across the top of the container. Thus the danger pre-existed the commencement of the stevedoring operations. The shipowner was held liable because the jury found that it breached its duty of supplying the stevedore with a reasonably safe place to work.

On appeal, the shipowner argued that because 29 C.F.R. 1918.94(c) impresses the stevedore with the duty of eliminating slippery conditions as they occur, and because the ice and slush were a patent or obvious danger, the shipowner should be exonerated *as a matter of law*. The Second Circuit rejected that argument because (a) a shipowner has a duty to provide a reasonably safe place to work; and (b) once a factfinder decides that said duty has been breached, a shipowner cannot escape liability because the stevedore was also negligent. Stated differently, *Irizzary* stands for the proposition that if a shipowner decides to shift a patent, pre-existing danger upon the stevedore, the shipowner runs the risk of being held liable if the factfinder concludes that the shipowner should have anticipated the harm despite the stevedore's concurrent knowledge of the danger.

Contrary to petitioner's contention, the fact that the *Irizzary* court makes reference to the Code section in issue cannot be taken to mean that the court interprets the Code as burdening the shipowner with a so-called continuing duty. Liability had been premised on the shipowner's breach of its *pre-discharge duty* to remove the ice and slush from an area which was going *to be* used by the stevedore.

The Joint Maritime Safety Code is reconcilable with the charge and, as discussed below, with *Scindia*, in another way. The Code provides that the shipowner "shall supply and maintain . . ." The cases *do* require the vessel to maintain a safe area when it is notified that the area has become unsafe in a way that a shipowner is expected to correct. Stated a bit differently, "maintain" does not mean to *assure* against mishaps as "unseaworthiness" did before Congress eliminated the unseaworthiness cause of action in 1972.

If "maintain" means to correct a condition which is in the ship's domain once it is told it needs correcting, then Part C-1 of the Code is perfectly reconcilable with the judge's charge in this case. To argue otherwise would be to allow petitioners to resurrect the liability-without-fault doctrine of unseaworthiness, which Congress and the courts have rejected. *See* the legislative history to the 1972 Longshore Act. H.R. Rep. No. 92 - 1441, 92d Cong., 2d Session, reprinted in (1972) U.S. Code Cong. & Ad. News 4705.

Petitioners cite *Scindia* for the proposition that the Supreme Court interpreted Part C, Section 1 of the Code to mean that shipowners have agreed to take on a duty which the law does not require, viz., a duty to discover and correct dangerous conditions that develop during the loading or unloading process. Indeed, petitioner's counsel now asserts that the vessel has a duty to send an officer to the edge of the hatch to look down upon

the longshoremen working in the hold and supervise their work! (Petition at p. 19)

Most significantly, the Supreme Court's reference to the Code is found in that portion of the opinion (the portion set forth under Roman numeral IV) which begins with the following sentences:

> "We arrive at the more difficult and recurring issue involved in this case: What are the shipowner's duties *when he learns* that an apparently dangerous condition exists or has developed in the cargo operations, which is known to the stevedore and which may cause injury to the longshoreman? Must the owner take some action?" (Emphasis supplied.) *Scindia, supra,* p. 172-173.

Thus, those questions are answered under the assumption that the shipowner *has learned* of the danger. As discussed above, the shipowner can only be held liable on constructive notice if the defect existed at the outset. That is because a shipowner has a duty with respect to the condition of the ship's gear, equipment, tools and work spaces *to be* used in the stevedoring operations.

What happens when a shipowner gets actual notice of a post-outset defect? Can a shipowner completely divorce himself from the stevedore's work and ignore a post-outset danger simply because the shipowner had *no duty* to learn of it? Those are the issues which are discussed in Section IV of the *Scindia* opinion, and it is in that section where the Court makes reference to the Code. Thus, *when read in context*, the Supreme Court's reference to *Irizzary* and to the Code cannot be taken to mean that the Supreme Court views the Code as imposing on the shipowner a continuing duty to inspect. Instead, the Court's Codal reference is only relevant to two categories of cases: those cases where a

shipowner has shifted a pre-existing danger upon the stevedore, or those cases where the shipowner has actual notice of a post-outset danger. Petitioners have never argued that respondent had actual notice of a post-outset danger, and thus only the first category is applicable.

As to the cases falling within the first category, the Code "mirrors" the Supreme Court's enunciation of a shipowner's pre-outset duty. The Code says:

> "The owner, master and officers of the vessel shall supply and maintain in safe condition for use all ship's gear, equipment, tools and work spaces which are to be used in stevedoring operations."

The Supreme Court said at p. 467:

> "The shipowner thus has a duty with respect to the condition of the ship's gear, equipment, tools and work spaces to be used in stevedoring operations."

And the Bussanich's charge, incorporating petitioner's theory of the case to the law, reads:

> "You must determine, as the jury, on the basis of the evidence, presented at this trial, whether the ammunition bulkhead or sheathing was or was not properly secured to the hold of the vessel, and whether the Defendant had a reasonable opportunity to inspect the ammunition bulkhead or sheathing prior to the Plaintiff's accident, but failed to do so, and whether such failure was a proximate cause of Plaintiff's accident and resulting injuries.

> If you find that the defendant failed to properly inspect the anmmunition bulkhead or sheathing prior to plaintiff's accident, you may find negligence on the part of the defendant." (2158-2159).

All three enunciations are perfectly consistent.

D. Petitioners' codal argument is overbroad.

As demonstrated by Petitioners' Brief opposing counsel has searched the four corners of the 55 page Joint Maritime Safety Code in a desperate attempt to find some clause or phrase which might somehow be relevant to the facts of this case. The search was futile, and petitioners must confine their codal arguments to their erroneous interpretation of Part C, Section 1 of the Code. Petitioners do not and cannot argue that other codal provisions are relevant to *the facts of this* Bussanich case. They instead cite various codal provisions having to do with lighting, ladders, heel blocks and hatch covers. (*See* Petition at pages 14-16.) While those provisions might be relevant to cases involving lighting, ladders, heel blocks and hatch covers, they are of no relevance here, and petitioners seek to bootstrap their codal arguments by asking this Honorable Court to review the entire Code despite the fact that C(1) was the only Code section which petitioners offered at trial and that C(1) was the only Code section which petitioners offered to the New York appellate courts.

As demonstrated above, the jury's instructions included a charge mirroring the language of C(1). Indeed C(1) was read to the jury, and the jury was never told to disregard it. The practical effect of all of this is that petitioners now seek a decision on issues which cannot have any effect upon the outcome of this case. On that score, it is to be noted that the New York Court of Appeals limited its discussion to C(1).

II.

THE CHARGE WAS PROPER IN ALL RESPECTS.

The challenged instruction reads as follows:

> "[O]nce an independent stevedoring contractor such as petitioner's employer has started the cargo handling operation, it becomes the stevedore's duty, not the vessel owner's, to take such steps as are necessary to maintain a safe place in which the stevedore's employees can work" (2193).

Despite the assertion that this charge constituted error, it is gratifying to note how well it fits the Supreme Court's standard which was enunciated in *Scindia*.

As stated in *Lemon v. Bank Lines*, 656 F. 2d 110, 115 (5th Cir. 1984), The *Scindia*

> "Court recognized that it was the stevedore, and not the shipowner who was the longshoreman's employer and therefore responsible for maintaining safe working conditions during cargo operations pursuant to 33 U.S.C. § 941. Hence, it was the stevedore who bore the burden of discovering any hazard created during the stevedoring operations."

While ruling upon the Requests to Charge, the following admonition was administered to Mr. Heller:

> "THE COURT: Look, you have an idea that you only charge your view of the evidence.

> MR. HELLER: I am prejudice, Your Honor. You know that, but . . .
>
> THE COURT: But it isn't our duty to adopt any one point of view of the evidence. Our duty is to give them a charge that if they find the evidence, witnesses within that, that they go that route. If they don't find it, they don't do that." (1912).

Petitioners continue to ignore the above-cited admonition. Once again, petitioners refuse to recognize respondent's cargo fence theory. Petitioners *assume* that the jury could not help but believe Bozo's incredible testimony, and then argue that the challenged charge is erroneous because a stevedore would not have control over a vessel's ammunition sheathing. However, the court properly refused to adopt petitioners' theory of the case to the exclusion of respondent's theory.

Petitioners also *isolate* the challenged instruction and argue that it is erroneous and/or inconsistent. That technique violates a fundamental principle of appellate review, *i.e.* that jury instructions must be considered *as a whole*.

> "In the review of jury instructions, a challenged instruction should not be considered in isolation but rather as part of an integrated whole. If, viewed in that light, the jury instructions are comprehensive, balanced, fundamentally accurate, and not likely to confuse or mislead the jury, the charge will be deemed adequate." *Schieb v. Williams,* 628 F. 2d 509, 511 (5th Cir. 1980). *See also, Kalish v. Krieger*, 42 A.D. 2d 955 (1973), *aff'd,* 35 N.Y. 2d 864; *Franks v. U.S. Lines*, 324 F. 2d 126 (2nd Cir., 1963).

Petitioners argue as if the charge did not encompass their view of the case. But it did. Indeed, but for the so-called "supplemental charge", it would have done so to *the exclusion of respondent's theory*. (Relevant portions of the charge are reproduced in the Respondent's Appendix pp. 1a.)

As rendered before the recess, the charge contained many specific references to petitioners' ammunition sheathing theory, but was devoid of any specific reference to respondent's cargo fence theory.

After reading the main charge but before the jury retired, the judge held a robing room conference. At that time, respondent took exception to the absence of any reference to the fence theory. The judge agreed to mention the word "fence" (2189). Respondent also advised the judge that a portion of the initial charge that had already been granted at the pre-charge conferences (1900, 1901, 1903, 1904) had not been read to the jury. The court agreed to rectify the omission (2185), and then completed the main charge. In doing so, the word "fence" was finally mentioned (2194-2195) and the now challenged charge was given[9] (2193).

A reading of the *whole* charge reveals that petitioners have no basis in the record upon which to argue that their version of the case was not clearly and adequately presented to the jury. Petitioners requested and received a charge which invited the jury to "buy" the ammunition sheathing theory. Contrary to petitioners' allegations, the jury was *never* told that the shipowner's

---

9. The charge in question is more accurately described as a *completion* of the main charge rather than a supplemental charge. It was delivered after a short robing room break in the proceedings and before the jury retired. It is respectfully submitted that the court would have committed error had it *not* continued and completed its charge. *See Carotenuto v. Surface Transportation, supra.* That is the very purpose of a robing room post-charge conference.

duty ceased once cargo operations began. Instead, the jury was told, and properly so, that the shipowner had to *provide* petitioner with a reasonably safe place to work, and that the stevedore had to *maintain* the work area during the cargo handling operation. The jury was not instructed that the stevedore had to remedy pre-existing hazards or *create* a safe work place. But it was told that the respondent could not be held liable if the *sole* cause of the accident was "an unsafe method or manner of unloading" *i.e.* stevedore's negligence (2160).

III.

THE DECISION BELOW DOES NOT "EMASCULATE" THE CODE.

As stated above, the only provision of the Code relied upon and argued by the petitioners below was Part C Section 1. Petitioners argued (and continue to argue) that this one sentence, selected from 55 pages of specific provisions, requires the shipowner to continually supervise and inspect all details of the stevedore's work. It was in response to that argument that the New York Court of Appeals held that the Code does not expand the duties imposed upon a shipowner pursuant to 33 U.S.C. Section 905(b).

Contrary to petitioners' arguments, the vitality of the Code is not premised upon its ability to expand the duties of a shipowner. The Code is a set of recommendations or guidelines to be used in stevedoring operations with the explicit purpose of avoiding accidents. Nowhere is it even implicitly stated in the Code that its provisions are intended to alter or expand the duties of the shipowner.

The Code is not a novelty. It is a list—a list of work practices generally agreed upon by the various entities involved in

stevedoring operations. The "duties", if any, contained therein are fully consonant with the general obligations imposed upon a shipowner under the negligence principles incorporated in 33 U.S.C. Section 905(b).

The opinion below does no more than state that the Code, by its language at Part C Section 1, does not expand the duties of a shipowner viz. 33 U.S.C. Section 905(b).

The New York Court of Appeals does not hold that the Code, in the proper case, should not be admitted into evidence. Thus in those cases involving fact patterns and/or instrumentalities specifically covered by the Code, its provisions may continue to be of value in acquainting the jury with the commonly agreed work practices of the industry.

CONCLUSION

For all the foregoing reasons it is respectfully submitted that the Petition should be denied.

Dated: May 16, 1986

Respectfully submitted,

DANIEL J. DOUGHERTY
KIRLIN, CAMPBELL &
KEATING
Attorneys for Respondent

APPENDIX A—PORTIONS OF TRIAL COURT'S CHARGE RELEVANT TO NEGLIGENCE

"Now, the Plaintiff, Ottavio Bussanich is suing the Defendant, United States Lines for money damage to compensate him for the personal injuries he sustained on October 23, 1974, at or about 2 p.m. while he was unloading cargo from the Defendant's vessel. *The Plaintiff claims he was struck on the head and neck by a large plank which was improperly secured or attached to the ammunition bulkhead or sheathing, as it is sometimes referred to, or has been during this trial.*

Plaintiff was employed by the Universal Terminal & Stevedoring Corporation as a longshoreman. *It is the Plaintiff's claim that the Defendant, United States Lines, was negligent in causing and allowing the bulkhead or sheathing to be constructed in an improper manner,* in failing to provide the Plaintiff with a safe place to work, in failing to discover and correct this dangerous condition. (2151-2152)

* * *

Now, I have just referred to the term negligence. What is negligence?

Negligence may be defined as the failure or omission to do some act or to perform some duty which one person owes to another. More simply defined, it is the absence of such care as a reasonably prudent person would be expected to use under the circumstances. Negligence is nothing more or less than carelessness. (2153)

* * *

I want to discuss with you the respective duties of the parties.

Appendix A

A ship owner, such as the Defendant, is subject to liability for injuries to longshoremen working on or near the vessel if, but only if, the ship owner knows of, or by the exercise of reasonable care would discover a dangerous condition existing on the vessel, and should realize that it involves an unreasonable risk of harm to such longshoremen, and, two, the ship owner fails to exercise reasonable care under the circumstances to protect the longshoremen against the danger.

A ship owner's liability for negligence is based upon the failure of the ship owner's officers or crew or ship's representatives to perform the duty of which a reasonably prudent officer, crew member or ship's representative should have done under the circumstances, that is, to provide a reasonably safe place for the Plaintiff to work, and to cause the remedy or removal of any dangerous or unsafe condition which it knows of, and in the exercise of reasonable care could discern or discover.

If you, the jury, find that the ship's officers, crew or representatives failed to exercise reasonable care and that failure to exercise such reasonable care was a proximate cause or contributed to the happening of the accident, you may render a verdict for the Plaintiff.

To repeat, a ship owner owes the duty of exercising reasonable care towards those lawfully aboard the vessel who are not members of the crew including a longshoreman such as the Plaintiff. The owner has a duty to see that such people as Plaintiff, while on board the ship, are not exposed to unnecessary risk, and to provide them with safety, and he is liable for negligence for his failure to take reasonable precautions for the safety of workers.

It is the duty of the ship owner to give notice and warning

Appendix A

s or defects in the ship, and appliances, and to avoid
langer. His duty is to provide a reasonably safe ship
vork on board. *You must determine, as the jury,*
of the evidence, presented at this trial, whether the
bulkhead or sheathing was or was not properly
hold of the vessel, and whether the Defendant had
opportunity to inspect the ammunition bulkhead or
or to the Plaintiff's accident, but failed to do so,
such failure was a proximate cause of Plaintiff's
resulting injuries.

nd that the Defendant failed to properly inspect the
bulkhead or sheathing prior to Plaintiff's accident,
l negligence on the part of the Defendant.

* * *

e stevedoring contractor who hired the Plaintiff in
harged with the duty of selecting the method of
perations to handle cargo, and if this accident was
by an unsafe method or manner of unloading the
ip owner may not be held liable.

of the stevedoring contractor who hired the Plaintiff
easonable supervision of the method or manner of
ected to be performed by their employers, and the
onably supervise the details of the stevedoring
(2160-2161) (Emphasis supplied)